who filed a cross-bill. From a decree which denied part of the relief sought, defendant appeals, and complainants assign cross-errors. Amended and affirmed.

Graham & Hawthorne, of Tazewell, *W. B. Kegley,* of Wytheville, and *S. M. B. Coulling,* of Tazewell, for appellant.

Henson & Bowen, of Tazewell, for appellees.

BARSA *v.* KATOR.

Sept. 20, 1917.

[93 S. E. 613.]

1. New Trial (§ 108 (3)*)—Newly Discovered Evidence—Grounds.—In assumpsit to recover a balance claimed by plaintiff upon a settlement of accounts growing out of numerous transactions, it appeared that plaintiff, who was a peddler, for which business defendant furnished him goods, had made numerous small payments. On trial, defendant contended that after the settlement plaintiff took from his home goods to a large value, which plaintiff denied. Defendant's only testimony was given by himself and another that plaintiff took two or three loads of goods from defendant's house when he moved. After a verdict for plaintiff, defendant moved for new trial for newly discovered testimony that several witnesses saw plaintiff taking goods from defendant's house after they severed business relations, and there was further testimony that defendant stated he had about $1,000 worth of goods, and that he ought to set up a store. Defendant filed an affidavit that he could not by the exercise of reasonable diligence have learned of such evidence before trial. Held that, as reasonable diligence on the part of the movant could not have secured the evidence at the former trial, and it is material, and not merely cumulative and collateral, and should produce a different result, and goes to the merits, the new trial should have been granted; the evidence falling within all the rules.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 447-451, cited by the court.]

2. New Trial (§ 102 (3)*)—Newly Discovered Evidence—Diligence.—Though one of the witnesses as to plaintiff's removal of the goods, whose testimony was alleged to be newly discovered, was a relative of defendant, living about 30 miles from the place of trial, yet where such witness had for nearly a year prior to trial been without the state, the case having been pending for over two years, defendant's failure to produce the testimony at trial does not show want of diligence.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 448.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

3. New Trial (§ 104 (2)*)—Newly Discovered Evidence—Cumulative Evidence.—The testimony as to plaintiff's removal of the goods, being of a different character and more specific and concrete than that offered by defendant at trial, cannot be treated as cumulative evidence, not warranting a new trial.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 449.]

4. New Trial (§ 105*)—Newly Discovered Evidence—Admissions of Party—Testimony.—The newly discovered testimony as to the admissions of plaintiff was independent evidence, and not cumulative, and warranted a new trial, though it impeached plaintiff's testimony given at the former trial.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 449.]

5. New Trial (§ 108 (2)*)—Newly Discovered Evidence—Sufficiency.—In such case the newly discovered evidence, particularly as some of the witnesses were free from any interest in the case, was such as would probably produce a different result on a new trial, and warranted the granting thereof.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 449.]

Error to Circuit Court, Wise County.

Action by Antonio Kator against George W. Barsa. There was a verdict for plaintiff, and his motion for new trial being overruled, and judgment rendered in accordance with the verdict, defendant brings error. Reversed.

R. T. Irvine, of Big Stone Gap, for plaintiff in error.

Vicars & Peery, of Wise, and *Morton & Parker,* of Appalachia, for defendant in error.

ROBINETT *v.* TAYLOR et al.

Sept. 20, 1917.

[92 S. E. 616.]

1. Wills (§ 449*)—Presumption—Partial Intestacy.—There is a presumption against partial intestacy.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 787.]

2. Wills (§ 449*)—Construction—Interest—Devise—"Property."—Testator, after devising lands to his three sons, devised land to his daughter for life, remainder to her heirs, and then directed that the parcel on which he resided should be rented and the proceeds applied to the support of his wife and two daughters, that at the death of his wife the land should be sold, and that two named sons should have an option to purchase the parcel at $1,800, and in event of their failure to exercise the option, the land should be sold to the highest bidder. The testator directed that after payment of his debts that all debts due him should be collected and property sold, the re-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.